

September 25, 1997



PROCUREMENT POLICY NOTICE
NO. 97-02

SUBJECT: Alternative Dispute Resolution

FROM: Betty L. Bailey, Director \s\
Office of Acquisition Management (OAM)

TO: OAM Division Directors
Regional Contracting Officer Supervisors
Howard Corcoran, OGC

I. SUMMARY: This Procurement Policy Notice (PPN) establishes policy and guidance for the use of alternative dispute resolution (ADR) techniques in connection with Agency-level protests, protests filed with the General Accounting Office (GAO), and disputes filed in accordance with the Contract Disputes Act of 1978, 41 U.S.C. §§ 601-613.

II. EFFECTIVE DATE: Thirty (30) days after date of issuance (shown above).

III. EXPIRATION DATE: Until further notice.

IV. BACKGROUND: The Administrative Dispute Resolution Act of 1996 (the ADRA), P.L. 104-320, 5 U.S.C. §§ 551 et seq., was implemented to encourage the nonmandatory use of ADR as an alternative to formal litigation. ADR refers collectively to a broad range of flexible procedures designed to resolve disputes at less cost, more efficiently and often, with greater satisfaction for the parties involved in the dispute than is often the case with formal litigation.

To encourage the use of ADR within the Government contracts arena, the ADRA amended the Contracts Disputes act to provide that “. . . a contractor and a contracting officer

may use any alternative means of dispute resolution . . . or other mutually agreeable procedures, for resolving claims.” 41 U.S.C. § 606(d). Similarly, the Federal Acquisition Regulation (FAR 33.204) provision implementing the ADRA states that it is “[t]he Government’s policy to resolve all contractual issues in controversy by mutual agreement at the contracting officer’s level . . . [and] [a]gencies are encouraged to use ADR procedures to the maximum extent practicable.” In addition, Executive Order 12979, entitled “Agency Procurement Protests” and signed by the President on October 25, 1995, urges agencies to “provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests, including . . . the use of alternative dispute resolution techniques[.]” GAO has also indicated its willingness to make greater use of ADR techniques as an alternative to its formal bid protest procedures. See GAO letter to Agency Senior Procurement Executives, dated September 23, 1996.

V. POLICY:

It is Agency policy to make maximum use of ADR as an alternative to formal litigation where it appears that such an approach will facilitate dispute resolution, save time or money, or would be in the best interests of the Agency. Every protest or dispute is a potential candidate for ADR. Moreover, because the goal of ADR is to resolve disputes at the earliest stage feasible, at the lowest appropriate organizational level, by the fastest and least expensive method possible, the contracting officer (CO) will be a key figure in deciding whether a particular protest or dispute is appropriate for ADR.

VI. APPLICABILITY:

FAR 33.214(a) addresses five essential elements of ADR:

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation;
- (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy; and
- (5) Contractor claim certification where necessary.

If the above elements exist, the CO and the contractor must determine whether an alternative method of resolving the issue or dispute is preferable to formal litigation. FAR

33.214(a) states, “The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy.” Using an ADR technique requires the unanimous consent of all the parties; if there are numerous parties involved, the likelihood of such agreement may be reduced. Note that ADR is not always an appropriate substitute for litigation, and COs should consider the following when making such a determination:

Factors favoring the use of ADR:

- (1) The law regarding the determinative legal issues is well-settled.
- (2) The dispute is primarily factual.
- (3) Each side's position has merit.
- (4) The cost of formal litigation could be excessive.
- (5) Extensive discovery is not necessary.
- (6) The parties are genuinely interested in settling the dispute but personality conflicts are adversely affecting settlement discussions.
- (7) ADR could speed anticipated settlement by limiting the exchange of information and time needed for resolution of the matter.
- (8) There is a desire to maintain a continuing amicable relationship between the parties.

Factors cautioning against the use of ADR (See 5 U.S.C. §572(b)):

- (1) The dispute is primarily over issues of law rather than fact.
- (2) A decision with precedential value is needed.
- (3) A significant policy question is involved.
- (4) A public record of the proceeding is desired.
- (5) The outcome will significantly affect nonparties to the dispute.
- (6) ADR will be more expensive and time consuming than formal litigation.
- (7) The dispute involves a willful or criminal violation of law.
- (8) Fraud is an element of the dispute.
- (9) The dispute is likely to be settled and ADR is unnecessary.

The above factors are not exhaustive and there are a number of legal considerations to be addressed when determining whether ADR is appropriate. Accordingly, the Office of General Counsel (OGC), should be consulted whenever a determination regarding the use of ADR is

being made.

VII. REQUIRED ACTION:

To achieve the Agency's goal of ADR utilization, every protest and dispute should be evaluated by the CO, in conjunction with OGC, for possible application of ADR techniques.

The ADRA defines ADR as "any procedure that is used, in lieu of an adjudication . . . to resolve issues in controversy including but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof . . ." 5 U.S.C. § 571(3). While there are a variety of ADR techniques, the following have proven to be effective within the Government contracts arena:

a. Arbitration: A process that involves the submission of a dispute to a neutral third party who renders a decision after hearing arguments and reviewing evidence. The parties may agree in advance whether the decision will be binding or advisory.

b. Negotiation: Informal negotiation by representatives, often alternates from the original parties, to settle the matter in controversy.

c. Conciliation: A third party attempts to reconcile the parties with an agreement created by negotiations.

d. Facilitation: A collaborative process used to assist the parties in reaching a goal that is mutually satisfactory to both parties. A facilitator assists the parties in defining the issues and increases the likelihood that consensus will be reached.

e. Mediation: A structured dispute resolution process whereby a neutral third party (mediator) assists the parties in reaching a negotiated settlement. The mediator helps the parties communicate, negotiate, and reach agreements and settlements, but is not empowered to render a decision.

f. Fact finding: The investigation of issues by a neutral who gathers information from all sides and prepares a summary of the key issues. A fact finder draws upon information provided by both parties, as well as upon additional research, to recommend resolution for outstanding issues.

g. Mini-trial: An attorney for each party presents an abbreviated version of that side's case. The case is not heard by a judge, but by high-level representatives from both sides who possess settlement authority. A mini-trial may be presided over by these representatives with or without a neutral advisor, who can regulate the information exchange. Following the presentations, the parties' representatives meet, with or without the neutral, to negotiate a settlement.

h. Neutral Evaluation: A third party neutral is presented with the facts by the parties and provides an evaluation of the merits of the controversy. This evaluation may aid the parties in resolution of the matter.

The foregoing is only a partial listing of ADR techniques. COs should be willing to consider any ADR procedure, or combination of procedures, that would promote the mutually satisfactory resolution of a protest or dispute. OGC should be consulted by the CO when such considerations are being made. Note that there are excellent Government resources available to parties seeking to use ADR. These resources include agency boards of contract appeals which have established a reciprocal sharing of neutrals arrangement and GAO which now provides ADR services for protests.

Attachment A to this PPN is an ADR acknowledgment letter that COs may use after receipt of a protest or claim to advise contractors of the ADR alternative to litigation. Questions regarding this policy should be addressed to Linda Avellar (202) 564-4356.

Attachment

ATTACHMENT A

ADR ACKNOWLEDGEMENT LETTER

[Immediately upon receipt of an agency-level protest, GAO protest, or claim, filed pursuant to the Contract Disputes Act, the Contracting Officer should consult with OGC and, if appropriate, send this letter acknowledging receipt of the protest or claim and soliciting the contractor's views on submitting the protest or claim to ADR.]

Dear [Contractor or Contractor's attorney, if represented by counsel]:

This acknowledges the [date] receipt of your [protest or claim - if a claim, indicate the amount of the claim]. I am reviewing your [protest or claim] and will contact you shortly. If you have any questions in the interim, please contact me on [phone number].

Please note that the Environmental Protection Agency (EPA) has an alternative dispute resolution (ADR) policy and strongly endorses the use of ADR as a means for resolving protests and disputes. Agency policy and federal law establish ADR as the preferred way to resolve protests and disputes arising out of Federal procurements. In short, ADR is an alternative to formal litigation that encompasses a broad range of dispute resolution techniques such as structured settlement negotiations, mediation, mini-trials, and arbitration. ADR is often quicker, less costly, and more satisfying to the parties than formal litigation.

ADR is voluntary and depends upon the involved parties (the Agency, your [company or client], and any other parties) agreeing to its use. If we use ADR and it proves to be unsuccessful in resolving your --

a. [if an agency-level protest insert the following:]

protest, the protest will revert to resolution under the Agency's standard protest procedures without penalty to either party.

b. [if a GAO protest, insert the following:]

GAO protest, the protest will revert to resolution under GAO's standard bid protest procedures, without penalty to either party. The parties should keep in mind that GAO's use of ADR techniques does not toll the protest's statutory deadline or any other independent timeliness requirements.

c. [if a claim, insert the following:]

claim, a contracting officer's final decision will be issued on the claim and you will retain all of your appeal rights under the Contract Disputes Act, 41 U.S.C. §§ 601-613. Accordingly, you will still be able to appeal my final decision to the Interior Board of Contract Appeals or the U.S. Court of Federal Claims.

Commensurate with my review of your [protest or claim], I will consider whether your [protest or claim] is appropriate for ADR. Likewise, I suggest that you explore the possibility of using ADR to resolve your [protest or claim]. If you would like additional information about EPA's ADR program or if you consider your [protest or claim] appropriate for ADR, please let me know. Again, ADR cannot be used without the unanimous consent of all parties.

I look forward to a mutually beneficial resolution of this matter.

Sincerely,

Contracting Officer